[2019] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 121/2016

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**TARA ESTATES LIMITED**	**APPELLANT**
AND	**MILTON ARTHURS**	**RESPONDENT**

Patrick Foster QC and Weiden Daley instructed by Hart Muirhead Fatta for the appellant

Christopher Kelman and Miss Stephanie Ewbank instructed by Myers, Fletcher & Gordon for the respondent

24, 25, 26 May 2017 and 12 April 2019

McDONALD-BISHOP JA

[1] I have read in draft the reasons for judgment of my sister Straw JA (Ag) and they accurately reflect the reasons for the decision of the court with which I concurred.

P WILLIAMS JA

[2] I too have read in draft the reasons for judgment of my sister Straw JA (Ag) and agree.

STRAW JA (AG)

[3] In this appeal, Tara Estates Limited (the appellant) sought to challenge an order made by Batts J on 16 December 2016. By that order, the learned judge, following an inter partes hearing, granted an interim injunction in favour of Mr Milton Arthurs (the respondent). On 24 and 25 May 2017, we heard submissions in this matter, and on 26 May 2017, we made the following orders:

> "1. Appeal allowed in part.
>
> 2. The grant of the interim injunction by Batts J on 16 December 2016 is affirmed.
>
> 3. The orders of Batts J made on 16 December 2016 appealed against are varied and shall now be read as follows:
>
> 1. The appellant is restrained, whether by itself or its servants or agents or otherwise howsoever, until the trial of this action or further order of the Court from doing the acts listed below or any or all of them on its property registered at Volume 1050 Folio 312 of the Register Book of Titles:
>
> a. Burning waste or debris.
>
> b. Causing or permitting noise levels during construction that exceeds 70 decibels at a distance of 50 metres from the property boundary.
>
> c. Causing or permitting to be left uncovered any construction material that generates fugitive dust during transportation or when stock piled.
>
> d. Causing or permitting during the construction phase the escape of fugitive dust from road, stock piles of soil and marl.

e. Conducting works of construction prior to 7:00am or after 6:00pm on weekdays and prior to 8:00am or after 6:00pm on Saturdays unless done with the permission of the relevant authority.

f. Conducting works of construction on Sundays unless done with the permission of the relevant authority.

g. Causing or permitting an accumulation of stagnant water.

2. The respondent, through his counsel, gives the usual undertaking as to damages.

3. Costs shall be costs in the claim.

4. Liberty to apply.

4. 40% costs in the appeal to the appellant to be taxed if not agreed."

[4] This judgment is a fulfilment of our promise to put our reasons into writing. We apologize for the lengthy delay in delivering the same.

Background

[5] The respondent and his parents are the joint registered owners of property located at Lot #3 Reading, Montego Bay in the parish of Saint James, registered at Volume 1090 Folio 837 of the Register Book of Titles. He resides at the property with his parents and he also operates a business there. The respondent describes the nature of his business as one of "construction and design...among other professional pursuits".

[6] The appellant is the sole registered owner of a large tract of land, which adjoins the western boundary of the respondent's property. This said property encircles five residential properties, including that of the respondents.

[7] The Saint James Parish Council, through its Local Planning Authority (LPA), granted approval to the appellant for the development of the land for the purpose of erecting 55 residential buildings. The approval was subject to conditions regarding the burning of garbage, discharge of waste, prevention of fugitive dust, and noise exceeding a certain decibel. The terms and conditions of the LPA approval, which are most relevant to this matter, are as follows:

> "5. The registered proprietor and/or occupier of this property shall not at any time permit or suffer any garbage to remain or be burnt on this premises otherwise than in accordance with the requirements of the Public Health Authority.
>
> 6. The building/property thereon shall not be used for any unlawful purposes or any purpose, which shall or might be or become a source of annoyance or objection to any person for the time being entitled to the benefit of this covenant and no nuisance shall be created or permitted on this premises.
>
> ...
>
> 29. No sullage (waste or effluent water) shall be permitted to be discharged onto any road or adjoining lands.
>
> 31. Construction materials that generate fugitive dust shall be covered during transportation and also when stockpiled on the site.
>
> 32. Noise level during construction shall not exceed 70dB at a distance of fifty meters from the property boundary."

[8] The National Environmental & Planning Agency (NEPA) also granted to the appellant a permit to undertake subdivision, authorizing it to subdivide 86,830.44

square metres of the land into 62 lots. The most relevant specific conditions on which it was permitted to do so are:

> "**DUST CONTROL**
>
> 12. The Permittee shall cover construction materials during transport to prevent the generation of fugitive dust.
>
> 13. The Permittee shall during the construction phase wet road surfaces and stockpiles of soil and marl to prevent the generation of fugitive dust.
>
> **CONDITIONS OF OPERATION**
>
> 14. The Permittee shall ensure that the noise level during construction does not exceed 70 dB at the boundary of the site.
>
> 15. The Permittee shall ensure that work is carried out between the hours of 7:00 a.m. and 6:00 p.m. from Mondays to Fridays and 8:00 a.m. and 6:00 p.m. on Saturdays. There shall be no work on Sundays and Public Holidays. Any work to be done outside of this period will require the permission of the [National Resources Conservation Authority].
>
> **SOLID WASTE DISPOSAL**
>
> 16. The Permittee shall ensure that there is no burning of waste or any other debris on the site."

[9] On 29 July 2016, the respondent filed a claim form and particulars of claim against the appellant grounded in nuisance wherein he sought an injunction and damages consequent on construction activities carried out by the appellant. He also filed a notice of application with a supporting affidavit seeking an interim injunction.

The alleged acts of nuisance complained of, which were asserted to have begun in or about January 2015, involved:

a) burning of waste and debris on the appellant's property causing harmful smoke and other emissions to enter the respondent's property;

b) noise levels exceeding 70 decibels at the boundary of the appellant's property;

c) excessive vibrations which occasioned physical damage to the respondent's property;

d) excessive dust, smoke and fumes entering the respondent's property from the appellant's property;

e) conducting construction work on the appellant's property prior to 7:00 am or after 6:00 pm on weekdays; prior to 8:00 am or after 6:00 pm on Saturdays; and on Sundays in breach of NEPA's permit;

f) causing the accumulation of stagnant water resulting in increased mosquito infestation; and

g) emission of excessive dust from the appellant's property onto the respondent's property.

[10] These allegations were supported by affidavits, various recordings, photographs, and an expert opinion by Dr Dain Clarke, a civil/structural engineer. The respondent also deponed that during the period September 2015 to August 2016, extensive

correspondence had passed between the parties on the subject. The appellant's general response was a promise to ameliorate or remove the matters complained of, which according to the respondent, had never been fulfilled.

[11] The appellant denied the allegations. In support of its case, the appellant relied on, among other things, the expert report and opinion of Dr Carlton Campbell, an environmental scientist, whose report raised questions as to the accuracy and calibration of the sound level meter used by the respondent. In his report, he also stated that no burning of waste, debris, vibrations, excessive dust, or stagnant water was observed on the day of his site visit. Dr Campbell also stated that the average decibel reading taken at the time of his visit to the site was 65.7 decibels. However, the maximum reading was measured at 100.6 decibels, and the peak reading at 108.6 decibels. These measurements were taken at the boundary of the premises.

[12] In response to Dr Campbell's assertions, the respondent obtained the assistance of Mr Paul Carroll, an environmental chemist, to review Dr Campbell's report as well as documentary evidence the respondent had submitted. In his report dated 22 November 2016, Dr Carroll said:

> "5. The maximum and peak levels quoted by Dr. Campbell appear to be at variance with his conclusion that ambient noise levels were compliant with what the Campbell report refers to as the NEPA permitted noise 'guideline' level of 70 dB."

[13] The application for an interim injunction was heard by Batts J on 8 December 2016. Having reviewed the evidence and the submissions of counsel for both parties, Batts J granted the interim injunction in favour of the respondent, and in doing so ordered that:

> "1. [The appellant] is restrained, whether by itself or its servants or agents or otherwise howsoever, until the trial of this action or further order of the Court from doing the acts listed below or any or all of them on its property registered at Volume 1050 Folio 312 of the Register Book of Titles:
>
> a. Burning waste or debris;
>
> b. Causing or permitting noise levels which exceed 70 decibels from the boundary of [the appellant's] property;
>
> c. Causing or permitting excessive dust, smoke or fumes to enter [the respondent's] property;
>
> d. Conducting works of construction prior to 7:00 AM or after 6:00 PM on weekdays and prior to 8:00AM or after 6:00 PM on Saturdays;
>
> e. Conducting works of construction on Sundays; [and]
>
> f. Causing or permitting an accumulation of stagnant water.
>
> 2. [The respondent] through his Counsel gives the usual undertaking as to damages.
>
> 3. Costs to [the respondent] to be taxed or agreed.
>
> 4. Liberty to Apply.
>
> 5. [The respondent's] Attorneys-at-law to prepare, file and serve this order.

6. Case Management Conference set for March 13, 2017 at 12:00PM for ½ hour.

7. Mediation is dispensed with."

[14] In his written reasons for granting the order for an interim injunction, the learned judge indicated that a number of factors had guided his consideration and ultimate decision. These were among the reasons that he gave:

a) The respondent had an arguable claim, one with a real prospect of success. At the interlocutory stage, his main purpose was to consider whether the claim was credible, it was found to be so. The fact that planning permission has been granted does not prevent a property owner from objecting to a nuisance, though the opinion of planning permission can constitute relevant evidence. See **Lawrence and Another v Fen Tigers Ltd and Others** [2014] UKSC 13; [2014] 2 All ER 622.

b) Damages may not be an adequate remedy in the event that the respondent was successful as the complaints made by him, and the evidence submitted in support, render the adequacy of damages as a remedy unlikely. These complaints include health issues, loss of sleep and an inability to carry on his business. Furthermore, the respondent offered an undertaking to the appellant that was supported by the value

of property, and other investments which he asserted in his affidavit filed 5 August 2010, had exceeded $30,000,000.00.

c) It was apparent from the respondent's claim that he did not wish to end construction activities by the appellant, but wanted it to merely uphold the standards imposed by the planning authorities. In light of this, it is unlikely that damages could flow as a result of an interlocutory injunction. In essence, if the appellant were compliant with the standards set forth by the planning authorities, the injunctive relief would not have an impact on its construction activity.

d) The inability to monitor or police an injunctive order was not a basis to refuse the granting of an interlocutory injunction.

The appeal

[15] Being dissatisfied with Batts J's order, and before receiving the written reasons for his decision, the appellant filed notice and grounds of appeal, challenging the learned judge's decision. On receiving the learned judge's written reasons, the appellant filed an amended notice of appeal on 9 March 2017, listing the following as their reasons for challenging the learned judge's decision:

> "3.(a) The learned judge erred as a matter of fact and law that the Respondent had met the requirements for the grant of an interim injunction in that the Judge failed to find as follows, that:
>
> (i) the grant of an injunction would be unjust and in particular, his Lordship failed to consider which

order would cause the least irremediable prejudice to both parties;

(ii) damages would be an adequate remedy for the Respondent;

(iii) the balance of convenience did not favour granting the injunctions;

(b) The learned Judge did not have any or any adequate regard to the Respondent not having in the proceedings in the Court below locus standi to seek or be granted the injunctions.

(c) The affidavit evidence before the Court failed to demonstrate that the Respondent had a serious question to be tried in his claim for nuissance [sic].

(d) There is no evidence that the Appellant was at the time of the hearing engaged in or was threatening any conduct giving rise to a cause of action on [the respondent's] part.

(e) The injunctions granted by the learned Judge are fatally uncertain of ascertainment as to whether or not there is not a breach thereof and is unjust, unfair, disproportionate and oppressive to the Appellant, and/or are null and void.

(f) The learned Judge did not have any or any adequate regard to the fact that:

(i) neither the decibel level provided for in Permit No. 2006-08017-EP0018 ('NEPA Permit') issued by National Environment & Planning Agency ('NEPA') nor in the Local Planning Authority ('LPA') building approval dated 5th November 2015 ('LPA Approval') is the basis of assessing whether the sound level of which [the respondent] complains amounts in law to a nuisance or sufficient to sustain any action in nuisance or any other cause of action known to law or otherwise;

(ii) the LPA Approval under which the housing units of the development are being constructed

provides in paragraph 32 that '*Noise level during construction shall not exceed 70dB at a distance of fifty metres from the property boundary',* as opposed to 70dB at the property boundary mentioned in the NEPA Permit relied upon by the learned Judge;

(iii) the matters of which the Respondent complains are in respect of the construction of housing units which are being constructed under the LPA Approval, and the NEPA Permit is relevant only to subdivision of the Appellant's property, and so the terms and conditions of the NEPA Permit upon which the learned Judge relied are (if for no other reason) irrelevant to the proceedings before the learned Judge;

(iv) the actual sound level at [the appellant] property boundary is reasonable;

(v) NEPA, after its investigations and several inspections, has not found any breach of the NEPA Permit and so has not issued any stop notices or orders for any breach of the NEPA Permit;

(vi) NEPA and the LPA scheme are supervisory in nature, a role which the courts have always frowned upon and exercised restraint thereby refusing interlocutory injunctions where it is clear (as here) that supervision is required;

(vii) if the Respondent is <u>dissatisfied</u> with that result of NEPA's investigations whose jurisdiction he himself <u>instigated</u>, he may seek to bring judicial review proceedings, and not seek to circumvent the requirements of that procedure by bringing this action in relation to the enforcement of the NEPA Permit or the LPA Approval in the proceedings below;

(viii) the Respondent was guilty of laches;

(ix) the Respondent did not come to equity with clean hands.

(g) The injunctions granted by the learned Judge require the Court's constant supervision, which is a well-established basis for refusing the injunctions.

(h) In requiring the Appellant]to apply from time to time under the 'Liberty to Apply' provision set forth in paragraph 4 of the order in carrying out its activities in constructing the housing units under the LPA Approval is unjust, oppressive, unreasonable, impracticable, and unworkable, as doing so will require frequent such applications at considerable expense.

(i) The injunctions, in the circumstances, unfairly and unjustly expose the Appellant to breaching its contractual obligations to third parties, and to financial ruin.

(j) In awarding costs to the Appellant the learned Judge incorrectly exercised his discretion.

(k) The learned Judge failed to having [sic] any adequate or any regard to the overriding objective of dealing with cases justly."

[16] The appellant sought the following orders from this court:

"(1) That the decision and order of Mr Justice Batts delivered on 16th December 2016 be set aside, save for paragraphs 5, 6 and 7 of the orders contained therein.

(2) That the costs of the Respondent's Notice of Application for Court Orders filed in the Court below on 29th day of July 2016, be awarded to the Appellant.

(3) That the costs of this appeal be the Appellant's.

(4) Such further or other order(s)/relief(s) as to this Honourable Court seem(s) just."

Appellant's submissions

[17] When the hearing commenced, learned Queen's Counsel for the appellant, Mr Patrick Foster, indicated to the court that he would not be pursuing grounds 3(b) and 3(f)(viii). He did not advance any arguments in relation to ground 3(f)(ix).

[18] Mr Foster posited, by way of preliminary submissions on the facts, that NEPA and the LPA are separate regulatory agencies with separate and distinct approvals and permits. He contended that the development is being undertaken in two phases with each phase being governed by the separate regulatory agency, and the aspect of the development relating to the NEPA permit was completed by late 2015. The current phase of the development, he submitted, is regulated by the LPA permit. Batts J's orders which followed the terms of the NEPA approval was accordingly erroneous.

[19] Learned Queen's Counsel, in any event, maintained that the sound level complained of did not amount to a nuisance, and could not have resulted in structural damage, and the respondent had failed to state with surety, whether the matters of which he complained were continuing at the time of filing the claim.

[20] Queen's Counsel asserted that NEPA has in place a comprehensive statutory scheme for the enforcement of breaches, which includes the issuance of stop notices. Similarly, the LPA has an arsenal of powers at its disposal with respect to enforcement of breaches under the Town and Country Planning Act. The practical and legal effect of the interim injunction granted by Batts J is to place the court in a supervisory role of NEPA and LPA. Queen's Counsel contended that courts have always frowned upon such

an approach and have always exercised restraint before so doing. Accordingly, in granting the interim injunction, Batts J had usurped the statutory powers of these regulatory bodies.

[21] Queen's Counsel contended, that the learned judge, in considering the application for the interim injunction, was required to examine whether the following principles set out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, were satisfied:

1. whether there is a serious question to be tried;
2. whether damages would be an adequate remedy for the applicant;
3. whether the undertaking in damages is adequate protection for the respondent; and
4. the balance of convenience.

Queen's Counsel further submitted, citing **National Commercial Bank Jamaica Limited v Olint Corp Ltd** [2009] UKPC 16, that the ultimate question is whether granting or withholding an injunction is more likely to produce a just result.

[22] By reference to these relevant principles, Queen's Counsel submitted, in summary:

1. There is no serious issue to be tried. The learned judge erred in his finding at paragraph [22] of his judgment that the

respondent had an arguable case in nuisance with a real prospect of success and that the claim was credible. In determining the above issue, the judge was under a duty to assess the evidence to be satisfied that there was an issue worthy of proceeding to trial with regard to a claim for nuisance. The question was whether the respondent had shown in his affidavit evidence a serious question as to whether there had been an unreasonable interference with the enjoyment of his property. In considering that question, the court was required to consider issues such as the abnormal sensitivity of the respondent.

2. The learned judge, instead, relied on the NEPA permit to assess whether the respondent's complaint raised a reasonable claim of nuisance. The standards of the authorities were used as a measuring device for determining whether they were relevant to nuisance. A nuisance claim is an independent cause of action and the learned judge simply found that because there was a breach of the NEPA conditions, there was a nuisance, and he failed to analyse the evidence, which he was required to do. If the evidence had been properly analysed the learned judge would have found that there was no serious issue to be tried on the claim.

3. Further, in relation to the NEPA permit, the learned judge would have been required to find that there was presently non-compliance with the NEPA conditions, which imposed the sound limit of 70 decibels at the appellant's land boundary. If there was no such finding, then there was no basis for the injunction. On the other hand, if the judge found that there was non-compliance, then the injunctions granted were not prohibitory, but were instead mandatory, because they would force the appellant to stop doing something that they allegedly did since 2015, and to do something else from 16 December 2016.

4. The learned judge failed to consider the fact that the respondent could be adequately compensated by an award of damages, since his claim for damages was an admission, as well as an indication, that any loss that he had suffered could be quantified in money. An undertaking in damages would have provided adequate protection for the respondent, and the appellant would be in a position to pay any damages which may be awarded. The learned judge also failed to properly consider that the respondent's claim was, to a significant degree, in relation to health issues adverted to in his affidavit. There was no serious analysis of these health

issues by the learned judge in the reasons for his decision, except to say that because of them, damages are not likely to be an adequate remedy. Consequently, the learned judge failed to give adequate consideration to the issue as to whether damages would be just and fair, especially when the completion of the project was imminent.

5. The balance of convenience was in favour of not granting the injunction. The remedy sought was wholly redundant as the injunctions would require the appellant to do something it has shown it had already been doing.

[23] Mr Foster also argued that the injunction was not justifiable in law or grounded in any cause of action known to law. There was no evidence that the appellant was at the time of the hearing, engaged in or was threatening any conduct giving rise to a cause of action on the part of the respondent.

[24] Additionally, in exercising his discretion, the learned judge had an obligation to make an order that would cause the least irremediable prejudice to both parties. The injunction had, in effect, adopted the NEPA conditions, which were vague because of the specific regulatory framework within which they were set up. To include them into a court order would serve to expose the appellant to contempt proceedings. Queen's Counsel maintained that the injunction was fatally uncertain of ascertainment as to whether there was a breach of it, and was unjust, unfair, disproportionate and oppressive to the appellant, and/or null and void.

[25] Queen's Counsel also asserted that the application for an interlocutory injunction in the instant case ought to have been refused, particularly, as it is clear that constant supervision by the court is required.

Respondent's submissions

[26] Mr Christopher Kelman, counsel for the respondent, expressed his agreement with the position that NEPA and the LPA are separate regulatory agencies with separate and distinct approval and permits. However, counsel maintained that this was irrelevant in the learned judge's assessment as to whether to grant an interim injunction, and was not a valid basis upon which to set aside the learned judge's order.

[27] In reliance on **Algix Jamaica Ltd v J Wray and Nephew Ltd** [2016] JMCC Comm 2, counsel submitted that the granting of the interim injunction was based on the common law cause of action in private nuisance, and the court is empowered to grant an injunction on this basis, independent of any enforcement powers of the regulatory agencies. As such, the learned judge's decision did not usurp the statutory powers of NEPA and LPA.

[28] Counsel contended that Mr Foster's submissions with respect to supervision and monitoring of interim injunctions are not supported by case law. Moreover, the issue of "continuous supervision" is primarily relevant to cases involving mandatory injunctions or decrees of specific performance, on the basis that the enforcement of such orders would potentially involve continuous monitoring of specific acts ordered to be taken by

the party enjoined, and accordingly, be more difficult and burdensome (see Commercial Injunctions, sixth edition, by Steven Gee, paragraph 2-034).

[29] In seeking to dissuade the court from accepting any arguments made on behalf of the appellant, Mr Kelman accepted that the relevant principles to be adhered to in granting an interim injunction are those outlined in **American Cyanamid**, and that the respondent had adequately met all the criteria as follows:

1. There was evidence on both sides which established that there was non-compliance with the maximum noise level stipulation. Contrary to submissions on behalf of the appellant, this is not a case involving a mandatory injunction, but rather a prohibitory injunction, as such the high threshold test being posited by counsel for the appellant was inapplicable. Moreover, the presence of these factors confirmed that there were serious issues to be tried.
2. The learned judge was correct to find that damages would not be an adequate remedy.
3. Contrary to the assertions of Queen's Counsel for the appellant, the interim injunction did not seek to end the appellant's construction activity, but rather sought to uphold the standards imposed by the planning authorities. The injunction only served to enjoin the appellant from breaching the conditions of its permits

and approvals, and the breaking of the law, and as such will have no impact on its construction activities.

[30] In all these circumstances, counsel submitted, the balance of convenience favoured the granting of the injunction, and Batts J was correct to so order.

Issues

[31] The salient issues which emanated for discussion from the grounds of appeal and the submissions of counsel in relation to them were:

a. whether there was sufficient basis for the granting of an interim injunction (grounds 3(a), (c), (d), (f)(i)-(vii), (i) and (k));

b. whether the interim injunction is uncertain of ascertainment thereby requiring the court's constant supervision, and is therefore unfair and disproportionate (grounds 3(e), (g) and (h)); and

c. whether costs were correctly awarded to the respondent (ground 3(j)).

Discussion and analysis

[32] It was important to bear in mind the limits within which this court must operate in conducting a review of this matter, and in deciding whether to set aside the learned judge's decision. The test in the case of **Hadmor Productions Ltd and Others v**

Hamilton and Another [1982] 1 All ER 1042 is well known, and is to be found in the words of Lord Diplock, at page 1046, of the judgment where he said:

> "...it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

[33] To set aside Batts J's order, we would therefore have had to find that he misunderstood the law or the evidence before him, he made an inference that particular facts existed or did not exist which could be demonstrated to be wrong by further evidence becoming available at the time of the appeal, or that the orders he had made were "so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it".

Issue (a): Was there sufficient basis for granting an interim injunction (grounds 3(a), (c), (d), (f)(i)-(vii), (i) and (k))

[34] In relation to ground 3(f)(vii), which suggests that if the respondent is dissatisfied with NEPA'S investigations, the proper remedy lies in judicial review proceedings against NEPA, we were of the view that there was no merit in this ground at this stage of the proceedings.

[35] The principles as to whether to grant an injunction are elucidated in the oft-cited decision of **American Cyanamid**. Of particular importance, is Lord Diplock's observation that at the interlocutory stage, what is important is that the court establishes that the claim being brought is not frivolous or vexatious, and that there is a serious issue to be tried. Mr Foster correctly cited these principles in his submissions which are set out at paragraph [21] herein. In **American Cyanamid**, at page 407, Lord Diplock provided the following guidance:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for

> detailed argument and mature considerations. These are matters to be dealt with at the trial."

[36] The decision of **NCB v Olint** confirms that the purpose underlying the granting of an interim injunction is to improve the chance of the court being able to do justice after a determination of the merits at trial. As such, the court must assess whether granting or withholding an injunction is more likely to produce a just result. At paragraph 19 of that judgment, Lord Hoffman opined:

> "...the underlying principle is... that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other..."

[37] Batts J was therefore not required to embark upon a trial of the action, on conflicting affidavits, in order to determine the strength of each of the party's case, but, as he did, assess whether the claim, as presented by the respondent, was arguable with a real prospect of success. In assessing the evidence, the learned judge at paragraphs [15]-[22] of his written reasons, reviewed and thoroughly analysed the aspects of the evidence which, in his view, raised questions which required further analysis at trial. In reviewing the evidence, and concluding that the interim injunction ought to be granted, Batts J stated the following at paragraph [22]:

> "It does appear to me that [the respondent] has an arguable claim or at any rate one with some real prospect of success. At this interlocutory stage I make no findings one way or the other. However, it is incumbent on me to consider whether the claim is credible and it certainly is. In this regard whether or not there is a nuisance is not a function of

> whether there has been planning permission or of any conditions imposed by the authorities, although the opinion of planning authorities constitute relevant, and sometimes very relevant, evidence. Neither is the inaction of planning authority determinative of the issue..."

[38] The law is clear that planning permission does not authorize the commission of nuisance (see **Lawrence v Fen Tigers Ltd** and Commercial Injunctions by Steven Gee). The respondent would have a common law right to bring a claim in nuisance as long as it is an actionable nuisance, independent of any breaches by the appellant of the conditions pursuant to planning permissions (see also **Algix Jamaica Ltd**, a judgment of Batts J, upheld by this court on 8 April 2016).

[39] Furthermore, as counsel for the respondent pointed out in his written submissions, the general conditions attached to the NEPA permit state that it is granted subject to any existing legal rights of third parties, and it does not authorise a contravention by the appellant of any obligations under the law, including the common law. The LPA permit also provides that no nuisance is to be created or permitted on the premises.

[40] We therefore found as unmeritorious the submissions by Queen's Counsel for the appellant that since NEPA had visited the site on 3 August 2016, conducted an inspection, and had issued no stop orders, the respondent, by inviting the court to intervene, was attempting to usurp the statutory powers of NEPA.

[41] The major concern appears to be the issue of the noise level. Batts J considered this issue along with the other areas of concern at paragraphs [15]-[19] of his reasons for judgment, and concluded that there was an arguable case with a real prospect of success. He noted that none of the measurements in evidence provided by the respondent or on behalf of the appellant, measured decibel levels 50 metres from the boundary. He also noted that the evidence suggested that the respondent's house was closer than 50 metres from the boundary, and that it would be for a trial court to determine the relevance of a 70 decibel requirement, 50 metres from the boundary.

[42] We were, however, constrained to accept Mr Foster's arguments that the learned judge did fall into error when, in the formulation of order 1(b) as stated in paragraph [13] herein, he appeared to have been guided by the conditions of the NEPA approval, instead of those imposed by the LPA. Mr Kelman submitted that this court should not entertain any request to vary the condition imposed by Batts J in relation to the decibel level. This is due to the fact that the case for both parties had established that the majority of the appellant's development work, closest to the respondent's western boundary, relate to subdivision of the road. He submitted further that the construction work associated with building the road, primarily falls within the scope of the subdivision works governed by the NEPA permit, and that in any event, the conditions of both permits are relevant evidence in the context of a private nuisance claim. Batts J was still entitled to consider the conditions of both permits and determine what, in his discretion, he believed to be reasonable, just and convenient.

[43] In our view, the learned judge ought to have been guided by the LPA approval, it also being operative during the stage of the development of which the respondent complained. The learned judge gave no reason for limiting the activities of the appellant to the NEPA guideline, which would prevent the appellant from operating within the radius allowed by the LPA approval. There must be a presumption that the limit fixed by the LPA is, prima facie, reasonable, and so the imposition of the NEPA condition at the current stage of the development, to which the LPA permit applies, would be unreasonable. In this regard, we found that he failed to take into account a relevant consideration and for that reason, he would have erred thereby entitling the court to interfere with the exercise of his discretion in relation to that issue.

[44] We found merit in the arguments proffered by Mr Kelman at paragraphs 36 and 37 of his written skeleton submissions, that damages were not adequate for the respondent in the circumstances. Further, he helpfully reminded the court of the thoroughness with which the learned judge dealt with the issue of inadequacy of damages at paragraph [23] of his written reasons for judgment. In **Lawrence v Fen Tigers**, the principles governing the court's jurisdiction to award damages instead of an injunction were examined. Lord Neuberger P, summarized these principles below:

> "[101] Where a Claimant has established that the Defendant's activities constitute a nuisance, *prima facie* the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the Defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case. However, ever since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)), the court has had power to award damages instead of

an injunction in any case, including a case of nuisance – see now s 50 of the Senior Courts Act 1981. Where the court decides to refuse the Claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the Claimant's property as a result of the continuation of the nuisance. Subject to what I say in paras 128 – 131 below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.

[102] The question which arises is what, if any, principles govern the exercise of the court's jurisdiction to award damages instead of an injunction. The case which is probably most frequently cited on the question is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 64 LJ Ch 216, 12 R 112, but there has been a substantial number of cases in which judges have considered the issue, some before, and many others since. For present purposes, it is necessary to consider *Shelfer* and some of the subsequent cases, which were more fully reviewed by Mummery LJ in *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1391, [2007] Ch 135, paras 35 – 59, [2007] 4 All ER 48.

[103] In *Shelfer*, the Court of Appeal upheld the trial judge's decision to grant an injunction to restrain noise and vibration. Lindley LJ said at pp 315-316:

> '[E]ver since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (eg, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.'

> [104] A L Smith LJ said at 322-323, in a frequently cited passage:
>
> > '[A] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the Plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.
> >
> > There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution . . . . In my opinion, it may be stated as a good working rule that –
> >
> > (1) If the injury to the Plaintiff's legal rights is small,
> >
> > (2) And is one which is capable of being estimated in money,
> >
> > (3) And is one which can be adequately compensated by a small money payment,
> >
> > (4) And the case is one in which it would be oppressive to the Defendant to grant an injunction – then damages in substitution for an injunction may be given.'"

Bearing in mind "the good working rule" as described by Lord Neuberger, and bearing in mind the reasons advanced by Batts J, it cannot be said that he erred in concluding that damages would not be an adequate remedy for the respondent.

[45] The balance of convenience, we found, was in favour of the granting of the interim injunction, as the orders as worded, do not compel the appellant to do

something it was not already required to do. Moreover, the orders do not seek to end or hinder the construction activity, instead, they merely seek to uphold the standards that had already been imposed by the planning authorities.

[46] We concluded that there was sufficient basis for the granting of the interim injunction, despite the failure of the learned judge to have regard to the radius for the noise level approved by the LPA. This error was not fatal to the decision to grant the interim injunction.

Issue (b): Whether the interim injunction is uncertain of ascertainment, unfair or disproportionate (grounds 3(e), (g) and (h)).

[47] The orders made by Batts J are not uncertain of ascertainment. While they relate to continuous daily activities, which may or may not be breached at a particular moment in time, they are specific. Batts J stated at paragraph [26] of his judgment that noise is only one aspect of the claim, and insofar as working hours and dust levels are concerned, the conditions do appear to be clear and unambiguous. In relation to the issue of monitoring, the learned judge stated that all orders require monitoring, and that the respondent would need to bring cogent evidence, at trial, to support his claim of a breach. Batts J also considered that the appellant had not said that compliance with the conditions imposed by NEPA and the LPA were impossible, but in fact, had asserted that it is compliant. He distinguished **Locabail International Finance Ltd v Agroexport and Others; The Sea Hawk** [1986] 1 All ER 901, which related to a mandatory injunction, and stated that the case before him was not one for mandatory

relief, and so would not attract a higher standard of deliberation in relation to imposition of an injunction.

[48] We agreed with the learned judge. It is quite clear that the appellant was, prior to the grant of the injunction, prohibited from carrying out certain activities in a certain manner. The fact that the orders are reflective of the conditions imposed by NEPA and the LPA do not make them mandatory, but even if they may properly be viewed as mandatory, they relate to matters, which the appellant is already mandated to do by law.

[49] There can be no injustice or unfairness in the appellant being ordered to do or to refrain from doing that which by law it is already obliged to do or refrain from doing. The NEPA permit, the terms of which were reflected in the learned judge's order, was operational during the course of the development of the property and not limited to just physical sub-division. The purpose was to supervise the development of the respondent's property for the protection of public health and the environment.

[50] The grant of the injunction, in the face of a prima facie case of nuisance with a reasonable prospect of success, was the course which would have produced the least irremediable prejudice in all the circumstances. It was neither disproportionate nor unfair.

Issue (c): Costs (ground 3(j))

[51] Batts J awarded costs to the respondent to be taxed if not agreed. He gave no reasons for not abiding by the usual order on applications for interim injunctions that

costs shall be in the claim. Given that there are various issues to be ventilated and resolved at trial, we formed the view, in concurrence with the appellants' arguments in respect of this ground, that the costs awarded ought to have awaited the outcome of the claim. The costs order made against the appellant was therefore varied to be costs in the claim.

Conclusion

[52] Having regard to the above-stated test in **Hadmor**, and to all the circumstances of this case, we found ourselves unable to say that the grant of the injunction was wrong for the reasons contended by the appellant or was "so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it". We did, however, find that there is merit in Mr Foster's argument that order 1(b), as worded, ought not to stand as it was guided by the NEPA approval, when it ought to have been guided by the LPA approval, which also lawfully applied to the appellant's undertaking. In relation to the decibel level imposed by the LPA, there is a presumption that it is prima facie reasonable, and so the imposition of the NEPA condition at the current stage of the development would seem to be unreasonable. The variation of order 1(b) of Batts J's order would therefore be necessary in order to ensure that the appellant complies with the conditions that had already been imposed on it.

[53] The order for costs to the respondent also required variation since the instant case related to an interim injunction. Accordingly, the order for costs to the respondent was also varied so that costs awarded shall be costs in the claim.

[54] All the orders except in relation to the noise level can be justified and must therefore remain.

[55] We deemed an award of 40% costs in the appeal to the appellant as appropriate since the appeal was allowed in part, with the variation of orders 1(b) and (3) in relation to costs.

[56] It was for all these reasons that we made the orders stated in paragraph [3] herein.